

DOCUMENT RESUME

08103 - [C334842]

[Allegation That Bid Was Nonresponsive for Failure To Furnish Detention Rates Comparable to Regulated Tariffs]. B-192443. November 22, 1978. 5 pp.

Decision re: Roarda, Inc.; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law II.
Organization Concerned: Department of Defense: Defense Fuel Supply Center, Alexandria, VA; L. A. Swann Oil Co.
Authority: 39 Comp. Gen. 595. 52 Comp. Gen. 266. F.P.R. 1-2.405. B-175243 (1972) .

A protester to a contract award alleged that the low bid was nonresponsive for failure to furnish detention rates comparable to regulated tariffs governing the local area of the receiving activity. The contracting officer did not abuse his discretion in determining that the bidder's deviation from the provision relating to detention rates could be waived as a minor informality since the additional cost to the Government resulting from the deviation was small compared to the total bid and to the difference between the low and second low bids. (HTW)

DECISION



J. Lawrence
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D C 20548
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8421

FILE: B-192443

DATE: November 22, 1978

MATTER OF: Roarda, Inc.

DIGEST.

IFB for supply of petroleum products permitted bidders to submit rates to be charged for the detention of their equipment by the Government during unloading, providing "detention rates not comparable to regulated tariffs may render a bid nonresponsive." Contracting officer did not abuse discretion in determining that bidder's deviation from this provision could be waived as minor informality, where it appears that incidence of detention is low and that additional cost to Government resulting from bidder's deviation was quite small when compared to its total bid and difference between its bid and second low bids for same items.

Roarda, Inc. (Roarda) protests the award of a contract to L.A. Swann Oil Co., Inc. (Swann) under invitation for bids (IFB) DLA600-78-B-0003 issued by the Defense Fuel Supply Center (DFSC) for petroleum products. Roarda alleges that the low bid submitted by Swann is nonresponsive because of Swann's failure to furnish detention rates comparable to regulated tariffs governing the local area of the receiving activity. Thus, Roarda argues, Swann's bid must be rejected by DFSC.

This protest involves Clause H3 of the IFB which permits bidders to specify a detention rate (demurrage) for detention of their equipment beyond free time due to Government-caused delays during off-loading. Initially, this clause read:

"H3 TRANSPORT TRUCK AND TRUCK AND TRAILER
FREE TIME AND DETENTION RATES (DFSC
1969 JUL)

"Upon arrival of Contractor's transport truck or truck and trailer, the receiving activity shall promptly designate the tanks into which the load is to be discharged.

Contractor shall be paid for detention beyond free time for delays caused by the Government.

"(a) Free time for unloading transport truck and trailer:

"(b) Rate for detention beyond free time:

"The above will not be considered in the evaluation of offers for award.

"UNLESS OFFEROR INDICATES OTHERWISE, FREE TIME WILL BE CONSIDERED UNLIMITED."

Subsequently, the clause was amended to read:

"H3 TRANSPORT TRUCK AND TRUCK AND TRAILER
FREE TIME AND DETENTION RATES (DFSC 1978 MAR)

"Upon arrival of Contractor's transport truck or truck and trailer, the receiving activity shall promptly designate the tanks into which the load is to be discharged. Free time will commence at the time the discharge hose is connected to fill pipe at the delivery point specified, and will end when discharge is completed. For items involving multiple drops, time between drops will not be included in free time. Contractor shall be paid for detention beyond free time for delays caused by the Government. A minimum of one hour free time is required. Rate for detention shall be comparable to regulated tariffs governing the local area of receiving activity.

"(a) Free time for unloading transport truck or truck and trailer:

"(b) Rate for detention beyond free time:

"The above will not be considered in the evaluation of offers for award, except that free time of less than one hour or detention rates not comparable to regulated tariffs may render a bid nonresponsive.

"UNLESS OFFEROR INDICATES OTHERWISE, FREE TIME WILL BE CONSIDERED UNLIMITED."

At bid opening, Swann was found to be the apparent low bidder on line items representing 84,000,000 gallons of fuel for a total estimated dollar value of \$23,568,970. Swann quoted a detention rate of one hour free time and \$12 for each 15 minutes over the first one hour, or an equivalent of \$48 per hour.

There appears to be no question but that Swann's detention rate was not "comparable" to regulated tariffs. The issue is whether Swann's deviation was sufficiently material as to warrant rejection of its bid. As we stated in our decision which is published at 52 Comp. Gen. 266 (1972):

"It is well established that bids which do not conform to the requirements of a solicitation must be rejected as nonresponsive unless the deviation is immaterial or is a matter of form rather than substance. A deviation is considered material, and is cause for rejection, if it affects price, quantity or quality (B-175243, June 16, 1972); however, a requirement in a solicitation is not necessarily material simply because it is expressed in positive terms with a warning that failure to comply 'may' or 'will' result in rejection of the bid as nonresponsive. See 39 Comp. Gen. 595 (1960) and FPR 1-2.405."

Roarda argues that by charging for detention of its equipment at rates higher than regulated tariffs, a contractor can reap "windfall profits" by lingering at the delivery point. Roarda contends that these charges could have a substantial impact upon the total cost to the Government and suggests that Clause H3 was rewritten to minimize that effect.

DLA, on the other hand, states that it believes that the incidence of charges for demurrage is "extremely small" and that it is not considered to have any impact on bid prices. In this regard, DLA notes that of the 122 bidders in this procurement, only 38 submitted detention rates: the other 84 bidders, under the terms of

Clause H3, offered unlimited free time. DLA advises that Clause H3 was intended to cover a contractor in the unlikely event his equipment was unreasonably detained and as an incentive for using activities to minimize delay. DLA further asserts that Clause H3 was revised not out of concern about windfall profits, but in response to an Army request that the term "free time" be clarified.

As indicated above, Swann was the low bidder for line items having an estimated value of \$23,568,970. An award to the next lower bidders for these line items would increase the cost to the Government by an estimated \$258,789.

After Roarda's protest was filed, DLA contacted the Government activities where Swann was the apparent low bidder and asked that they furnish the actual detention rates charged and paid under current contracts. All but one installation had incurred no detention charges during the prior year and that installation reported a total of \$590 in detention charges during 1977. However, it does appear that one installation requires slightly more than one hour to unload a truck of fuel oil because of the capacity of that installation's pump. In this regard, DLA states that it:

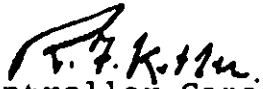
"* * * calculated the effect that charges for detention at this location could have on the relative bid prices and found it to be de minimis. Assuming a maximum of 1400 truck deliveries a year (actually 1200 truck deliveries would be a more reasonable estimate if deliveries continue as they have during the current contract), and using Swann's detention rate, the demurrage would total a maximum of \$16,800. Taking the difference between what Swann could charge and what Roarda could charge, the maximum impact of detention charges at the Norfolk Naval Amphibious Base is approximately \$9,000 to \$10,000."

Here, we are dealing with a provision which does not affect the basic obligation of a contractor to deliver petroleum products at a stated price, but which was intended to make available to contractors a means

of protecting themselves against loss in the event their equipment was unjustifiably detained at a Government installation. DLA states that in its experience, demurrage charges are uncommon and not a factor in the bidders' pricing; this appears to be borne out by the fact that 69 percent of the bidders on this procurement offered the Government unlimited free time for unloading.

It seems to us that the additional demurrage charges which could reasonably be expected to result from Swann's deviation from the solicitation instructions would amount to approximately one-tenth of one percent of Swann's total bid and 4 percent of the difference between Swann's bid and the second lowest bids for the same items. Under these circumstances, we believe the contracting officer acted within her discretion in determining the deviation taken by Swann to be waivable as a minor informality.

The protest is denied.


Deputy Comptroller General
of the United States